85-789

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

JOSEPH J. HIEGEL

Petitioner

vs.

STEVE HILL, MARVIN OWEN and
THE CITY OF HOT SPRINGS

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 8th CIRCUIT

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QUESTIONS PRESENTED

(1) WHETHER OR NOT THE 8TH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT IN APPLYING 42 U.S. CODE §1983, §1985 WHERE SAID COURT UTILIZED A "SUBJECTIVE TEST" ON THE PART OF THE DEFENDANT POLICE OFFICER AS RELATES TO THE USE OF EXCESSIVE FORCE AGAINST THE PLAINTIFF.

(2) WHETHER OR NOT THE 8TH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S APPLICATION OF 42 U.S. CODE §1983 AND §1985 WHERE SAID DISTRICT COURT RESTRICTED RECOVERY IN SAID CIVIL RIGHTS CASES FOR THE DEPRIVATION OF CONSTITUTIONAL RIGHTS SOLELY TO THOSE CASES INVOLVING THE USE OF "DEADLY FORCE" AS OPPOSED TO MERELY "EXCESSIVE FORCE."

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 8th CIRCUIT

The Petitioner Joseph J. Hiegel respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 19, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix A hereto, and is reported at 771 Fed.2d 358 (1985). The opinion of the United States District Court for the Eastern District of Arkansas, Oren Harris, Circuit Judge, sitting non-jury, appears in Appendix B, and is not reported.

o

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 19, 1985. This petition was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

o

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42; United States Code 1983, 1985:

§ 1983 — Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

§ 1985 — Conspiracy to interfere with civil rights —

(3) — Depriving persons of rights or privileges. If two or more persons in any State or Territory, conspire, . . . , for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges an immunities under the laws, . . .; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This case involves a claim for damages brought by the plaintiff, Joseph Hiegel, against the named defendants under the authority of Title 42 U.S. Code, § 1983 and § 1985, for money damages arising out of personal injuries and deprivation of civil rights that the plaintiff received while in the custody of the police in the City of Hot Springs, Ark., on July 22, 1982. § 1985 was invoked against the police chief, Marvin Owen, as having promulgated a city policy invoking the use of force that, it was contended, was a violation of the civil rights of plaintiffs such as Mr. Hiegel.

The case was tried non-jury before the Honorable Judge Oren Harris, U.S. District Judge, and an Opinion was entered on June 19, 1984, dismissing plaintiffs, case against the defendants.

The matter was appealed to the 8th Circuit Court of Appeals in which the appellant contended that the District Court erred in applying the aforementioned statutes by utilizing a "subjective" test on the part of the police officer as relates to the use of force against the plaintiff. Likewise, the appellant/plaintiff appealed alleging error that the District Court erred in applying 42 U.S. Code § 1983, § 1985 under an opinion that restricted recovery for deprivation of constitutional rights to those cases involving the use of deadly force as opposed to merely excessive force.

The complaint was filed against Steve Hill, the arresting officer in question, and Marvin Owen, Chief of Police of the City of Hot Springs. The plaintiff, Mr. Joseph J. Hiegel, was returning to Arkansas for a family reunion to be held in Conway, Ark. While traveling from Florida (his permanent residence) with his companian Loretta Becker, later his wife, plaintiff came to the City of Hot Springs, Garland County, Ark., a resort city, and while socializing with friends in that city was arrested by the defendant officer, Steve Hill, for driving while intoxicated. It was not contested by the plaintiff that he was intoxicated at the time of the incident in question.

Plaintiff was escorted by Officer Hill to the Sheriff's Department where he was given a breathalizer test. While escorting plaintiff from the Sheriff's Department back to

the patrol car, an altercation ensued in which Officer Hill struck the plaintiff in the head with a heavy metal flashlight causing him to suffer severe brain damage. There is no dispute in the case that plaintiff was unarmed and that Officer Hill was armed with a flashlight and revolver. Also, there is no dispute in the facts that, at least, one other officer was present at the time of the incident.

Plaintiff indicated that he had no recollection of the incident whatsoever and the Officer testified that the plaintiff, apparently, had, for reasons that were never clearly established, taken a swing at him hitting him on the chin. The heavy metal flashlight used to strike plaintiff in the head by the defendant Hill was a long four-battery special "Calite" flashlight used as much for defensive purposes as for illumination.

Dr. James Arthur, a neurosurgeon and treating physician of the plaintiff, performed brain surgery on plaintiff removing a subdural hematoma as well as part of plaintiff's brain and testified that the plaintiff suffered from a "contrecoup" injury whereby trauma is exerted to one side of the brain causing severe injury to the opposite side. The surgery in question consisted of removal of the temporal tip of the brain which was found to be "necrotic" as a result of the aforementioned trauma. Dr. Arthur testified that had the plaintiff not received proper medical attention he would, probably, have died as a result of this injury.

Likewise, as a result of the injury, plaintiff has suffered permanent neurological injury to the right side of his brain involving headaches, permanent hearing loss, a certain loss of memory and dizziness which have persisted to this date.

Plaintiff brought the action for damages for medical expenses as well as pain and suffering, mental anguish and permanency of the injury.

The District Court decided the case in favor of the defendant police officer and the City of Hot Springs. The Court decided that whether or not the force in question was justified should be viewed from the subjective prospective of the police officer.

The plaintiff appealed the matter to the 8th Circuit Court of Appeals which affirmed the findings of Judge Harris in an opinion of August 19, 1985. In a brief opinion the 8th Circuit simply found that the issue before it was a question of fact and on that basis it would not overturn the District Court's judgment on the merits. The 8th Circuit did not address itself to the legal issues raised by the appellant.

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REASONS FOR GRANTING THE WRIT

The Decision Below Has Resolved An Important Question Of Federal Law In A Manner Inimical To The Established Intention Of 42 U S. Code §1983 And §1985.

On Page 7 of the District Court's opinion the District Court stated:

> §41-510 (Arkansas Statute) provides for the use of deadly force from the subjective perspective of the officer. An officer is justified in using such force if *he* reasonably believes it necessary to effect the purposes of his responsibility pursuant to the statute. The Court is of the opinion that whether there was

> deadly force used should be viewed from the same perspective. (Emphasis by the District Court).

The District Court then goes on to conclude that Officer Hill "did not intend to cause serious physical injury when he struck out at Mr. Hiegel." The District Court has previously (page 6 of its opinion) stated its interpretation of the respective positions of the parties:

> The plaintiff urges the Court to view the use of the flashlight in a retrospective fashion. Thus, since the flashlight was used in a fashion which caused serious physical injury, it should be construed as the use of deadly force. The defendant urges the Court to view the use of the flashlight from the *subjective* perspective of Officer Hill before the contact occurred. (Emphasis added).

It has repeatedly been held that whether or not the defendant intended to injure the plaintiff is immaterial. See *Monroe v. Pate*, 365 U.S. 167 (1961). A person is generally held to accept the natural consequences of one's acts when done knowingly and voluntarily despite specific intent.

The District Court went on to apply a subjective test in that it accepted the officer's interpretation of the facts without regard to an objective scrutiny of same. The District Court concluded:

> Because Officer Hill did not view beforehand his use of the flashlight as the use of deadly force, this court is of the opinion that deadly force was not applied. (Page 7).

The Court took the position that what the defendant officer believes to be true is to be accepted without further objective analysis by the trier of fact.

Of course, the employment of the objective or "reasonable man test" is well settled in basic tort law. (See Prosser on Torts, 4th Ed., at Page 149).

It is also well settled that whether the defendant believes he has used reasonable care is immaterial. See *The Germanic,* 196 U.S. 589 (1904).

Likewise, the Restatement of Torts 2nd, Section 283 (C), states:

> The standard which the community demands must be an objective and an external one, rather than that of the individual judgment, good or bad of the particular individual.

The District Court in this case has said that since the defendant did not intend harm, despite the fact that he may have caused it, and reasonably been expected to cause it as a result of his actions, that the fact that he did not intend to use deadly force, despite the fact that he, in fact, did use deadly force, absolves the defendants of culpability under Civil Rights 42 U.S. Code §1983.

In short, the District Court was content to conclude that the actor, i.e., Officer Hill, simply did not intend harm or the use of deadly force and, therefore, must be taken at his word.

Obviously, if all is required in defending these cases is for the officer or official in question to testify that he really did not intend harm or the employment of deadly force, regardless of the objective inferences that could be drawn, the ability of the plaintiffs to affect recovery in §1983 and §1985 cases will be severely impaired. The District Court summed up its reasoning as follows:

> Because Officer Hill did not intend to cause serious physical injury, deadly force as defined under the statute was not used. (Page 7 of District Court's opinion).

Clearly, the District Court is applying the subjective test contrary to all precedent in this regard and the clear intention of Congress enacting 42 U.S. Code §1983.

The 8th Circuit Court of Appeals affirmed the District Court's decision in this matter without addressing itself to this issue. The 8th Circuit simply affirmed on the basis of the fact finding power of a District Court sitting non-jury and avoided scrutinizing the legal reasoning applied by the Court in reaching its conclusion.

Obviously, the intention of the Civil Rights Act 42 U.S. Code § 1983, was to protect citizens against the deprivation of any constitutional rights secured by the federal constitution and further to provide a remedy in federal courts to protect same. The District Court in question has used an Arkansas Statute to employ a subjective test in determining the reasonableness of defendant's actions. This state statute, even if properly applied, has clearly been preempted by the federal statute in question under the authority of the aforementioned cases, see *Mitchum v. Foster*, 407 U.S. 225 (1972) and *Damico v. California*, 389 U.S. 416 (1967).

Whether Or Not The District Court Erred In Applying 42 U.S. Code §1983 And §1985 Where The District Court Restricted Recovery For The Deprivation Of Constitutional Rights Under Said Act To Those Cases Involving Use Of "Deadly Force" As Opposed To Merely "Excessive Force."

The District Court unambiguously couches the issue in question in terms of whether or not the defendant Steve

Hill employed deadly force and, if so, whether or not said force was justified under Arkansas Law. Appellant in this case would urge that this was clearly erroneous. Under 42 U.S. Code §1983, Arkansas Law would clearly be pre-empted by the Federal Statute. See *Monroe v. Pate,* 365 U.S. 167 (1961) and further under 42 U.S. Code §1983, there is no statutory language or authority to support the position that recovery can be had under said statute only in those cases involving deadly force. A review of the District Court's opinion beginning on Page 5 through Page 9 is clearly couched in its very restrictive interpretation of 42 U.S. Code §1983. Specifically, the District Court says as follows:

> The plaintiff contends that Officer Hill unjustifiedly used deadly force against him and thereby deprived him of constitutional rights in violation of 42 U.S. Code §1983. Plaintiff contends such policy or custom was pursued by the defendants in violation of 42 U.S. Code §1985, conspiracy to interfere with civil rights.
>
> The defendants contend that under the circumstances of the case that deadly force as defined in the statute was not used. Alternatively, if the Court should decide that the officer used deadly force, the officer was justified under the facts and circumstances of the case to use such force. Further, the charges against police chief Marvin Owen and the City of Hot Springs have not been substantiated by a preponderance of the evidence in the record.
>
> The Court is guided in its determination of this case by Arkansas statutes concerning justification, Ark. Stat. Ann. §41-501 et seq. §41-501(5) defines "deadly physical force" as "physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury." §41-510

> states that "a law enforcement officer is justified in using deadly physical force upon another person when he reasonably believes that it is necessary."

As previously quoted, the District Court concluded on Page 7 that:

> Because Officer Hill did not intend to cause serious physical injury, deadly force as defined under the statute was not used.

Thus, it can be seen that the District Court narrowed the issues exclusively along the lines of the use of deadly force. In doing so, the appellant would urge that the Court has misstated the law as well as appellant's own position. The appellant took the position in this case that the force in question was excessive under 42 U.S. Code §1983 and §1985 and it did not take the position that this case stood or fell on the issue of deadly force. However, since deadly force tends to be excessive, plaintiff took the position that the force used in question was, in fact, deadly. This interpretation of the use of the flashlight was practically admitted by the defendants and since deadly force tends to be excessive the appellant took the position that the force employed in question was, in fact, excessive as well as being deadly. However, it was made clear to the District Court that plaintiff's case could succeed if the trier of fact found the employment of the flashlight in question was merely excessive irrespective of whether or not a factual determination was ever made concerning whether it was per se deadly.

The District Court simply looked at the deadly force issue without ever addressing itself to the broader issue of excessiveness. Under the District Court's interpretation, no 42 U.S. Code §1983 case could succeed unless it was

shown that the amount of force in question was per se deadly.

Again, the 8th Circuit Court of Appeals did not address itself to this issue but simply affirmed the entire case on the basis of the fact finding authority of the District Court without reviewing the underlying legal reasoning. Thus, in effect, denying the plaintiff a review upon the law.

Obviously, if this is permitted, the entire purpose of the Civil Rights Act in question will be severely undermined.

—o—

CONCLUSION

The District Court committed two obvious errors of law and the 8th Circuit Court of Appeals declined an opportunity to correct this injustice. By doing so they made recovery under 42 U.S. Code §1983 and §1985 extremely difficult and by doing so, likewise, undermined the legislative intent of said statute. The plaintiff does not question the fact that he should have been arrested. However, he does contest the justification for the police inflicting severe physical punishment upon him. The District Court has misapplied the law and the Court of Appeals has refused to remedy this.

For this reason the petitioner earnestly requests that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the 8th Circuit.

Respectfully submitted,

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711 West Third Street
Little Rock, Ark. 72201

By /s/ Phillip H. McMath

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1814
No. 84-2045

Joseph J. Hiegel,

Appellant,

v.

Steve Hill & Marvin Owen,

Appellees.

• • •

Joseph J. Hiegel,

Appellant,

v.

City of Hot Springs, Arkansas by and through the Civil Service Commission of the City of Hot Springs, Arkansas,

Appellee.

Appeal from the United States District Court for the Western District of Arkansas

Submitted: March 11, 1985
Filed: August 19, 1985

Before J. R. GIBSON and BOWMAN, Circuit Judges, and SACHS, District Judge.*

BOWMAN, Circuit Judge.

Joseph J. Hiegel brought this action under 42 U.S.C. §§ 1983, 1985. Defendants are a police officer, the Chief

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* The HONORABLE HOWARD F. SACHS, United States District Judge for the Western District of Missouri, sitting by designation.

of Police, and the city of Hot Springs, Arkansas. Following a non-jury trial, the District Court entered judgment dismissing Hiegel's complaint and awarded costs against Hiegel. We affirm the judgment of the District Court with respect to the merits of this case, but we reverse the award of costs and remand this case for a new determination of costs.

I.

Hiegel and a companion were arrested by Hot Springs Police Officer Steve Hill on July 22, 1982; Hiegel was charged with driving while intoxicated, his companion was charged with public intoxication. There is no dispute that while in police custody, Hiegel sustained serious neurological injury when he was struck with a flashlight by Officer Hill. There is, however, conflicting evidence as to the circumstances of this incident. The District Court heard the evidence, made factual findings, and concluded that Hiegel's claims should be dismissed.

We have carefully reviewed the record. We find that the District Court's judgment as to the merits of this case is based on findings of fact that are not clearly erroneous, and that no error of law appears. We therefore affirm that judgment. *See* 8th Cir. R. 14.

II.

Under Rule 54(d) of the Federal Rules of Civil Procedure, a district court has considerable discretion to award costs in favor of a prevailing party. But, the discretion "to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964).

Upon review, "a district court's taxation of costs may be set aside only upon a finding of abuse of discretion." *United States Marshals Service v. Means*, 741 F.2d 1053, 1057-58 (8th Cir. 1984) (*en banc*).

Defendants' motion for costs in this case sought reimbursement of: (1) expenditures for a transcript and court reporter services in connection with depositions; (2) expenditures for travel and subsistence in connection with defense counsel's attending two depositions and the trial; (3) expert witness fees; and (4) expenditures for travel and subsistence in connection with the appearance at trial of defendants' expert witness. Many of these items are beyond those expressly provided for in the applicable statutes. *See* 28 U.S.C. §§ 1821, 1920. The District Court summarily stated that it had considered defendants' motion, plaintiff's objection thereto, and the case record as a whole and that, in its opinion, all of the expenses claimed by defendants were "reasonable and necessary expenses of the litigation." Thus, the court ordered the entire amount claimed by defendants taxed as costs against plaintiff.

"The rule traditionally followed by federal courts is that [expert witness] fees cannot be recovered as costs beyond the statutory allowances for attendance, mileage and subsistence provided in 28 U.S.C. § 1821." *Paschall v. The Kansas City Star Company*, 695 F.2d 322, 338 (8th Cir. 1982), *vacated and rev'd en banc on other grounds*, 727 F.2d 692 (8th Cir.), *cert. denied*, 105 S. Ct. 222 (1984). This Court, however, has determined that expert witness fees may be recovered as costs under Rule 54(d) "when the expert's testimony was crucial to the issues decided." *Nemmers v. City of Dubuque*, 764 F.2d 502, 506 (8th Cir.

1985); *Coleman v. City of Omaha*, 714 F.2d 804, 809 (8th Cir. 1983). And recently, the Court approved as the method for awarding such costs the approach of the Third Circuit: "'A district court should . . . carefully scrutinize the prevailing party's bill of costs in order to assure that any award will compensate those expenditures necessary to the iltigation.'" *Nemmers*, 764 F.2d at 506 (quoting *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3rd Cir. 1981)).

The order of the District Court awarding costs in this case does not contain any indication that the court carefully scrutinized defendants' bill of costs or that it found the expert testimony for which plaintiff now is being charged to be "crucial to the issues decided." *Cf. Nemmers*, 764 F.2d 502 (district court's costs award including $11,901 in expert witness fees affirmed where court had determined that the expert's testimony was indispensible as crucial to the issue decided). Under these circumstances, we hold that it is an abuse of discretion to tax as costs expenditures for expert witnesses in excess of the statutory allowances of 28 U.S.C. § 1821. The District Court should not have summarily awarded as costs amounts for expert witness fees and travel and subsistence expenses incurred in bringing defendants' expert witness to the trial.

We also are troubled by the District Court's summary treatment of defendants' claims for attorney's travel and subsistence expenses. The Seventh Circuit has specifically held that such expenses are not recoverable as costs. *See Wahl v. Carrier Manufacturing Co.*, 511 F.2d 209, 217 (7th Cir. 1975). While we are not prepared at this juncture to bar in all cases the recovery as costs of an attorney's travel and subsistence expenses, we do not think such an award

should be made cavalierly. As we have noted, *supra*, costs above those allowed by statute should be awarded only sparingly. Where costs exceeding those authorized by statute are to be awarded, a district court should set forth the particular circumstances of the case which justify such an award, especially when an unsuccessful civil rights plaintiff is to be taxed such costs following the trial of a non-frivolous claim.

III.

With respect to the merits of this case, the judgment of the District Court is affirmed. The District Court's award of costs is vacated and the case is remanded for a new determination of costs.

SACHS, District Judge, concurring.

The surviving portion of the panel opinion in *Paschall v. The Kansas City Star Company*, 695 F.2d 322, 338 (8th Cir. 1982), endorses a trend toward more frequent allowance of expert witness fees as costs. The decision here and others cited by the court suggest there may be some reversal in the trend, and some movement toward Judge Henley's dissenting position on costs in *Paschall*. I find it unnecessary to deal with the *Paschall* ruling itself. As a trial judge I have not considered that the *Paschall* cost-assessment rule applies regardless of which party prevails, nor have I supposed that the majority opinion in *Paschall* was intended to expose unsuccessful plaintiffs to all of the financial burdens imposed on losing defendants.

On remand to me of *Paschall*, counsel for the ultimately prevailing defendant have apparently not sought to recover expert witness fees. Total costs were taxed, by stipulation, in the amount of $41,194.89, as contrasted with

the expert witness fees alone of $312,932.28 allowed to plaintiffs when they were the prevailing parties.

Presumptive ability to pay is doubtless one of the factors causing different standards to be applied to plaintiffs and defendants in assessing attorneys fees as costs in civil rights litigation. Compare *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423 n.20 (1978) (finding insufficient "equities" to deny the EEOC the normal favored treatment enjoyed by prevailing plaintiffs). While acknowledging that even-handedness has much intrinsic appeal and simplifies the exercise of discretion, I believe the chilling effect on litigation rights is excessive when defendants' expert witness fees are frequently assessed against plaintiffs. I therefore believe the trial judge in this case should not have applied the *Paschall* cost-assessment rule in a case in which defendants prevailed.

I join the opinion on the merits and concur in the result as to the assessment of costs.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

NOS. 82-6059 and 84-6050

JOSEPH J. HIEGEL,

PLAINTIFF,

vs.

STEVE HILL, MARVIN OWEN, and
THE CITY OF HOT SPRINGS,

DEFENDANTS.

MEMORANDUM OPINION

(Filed June 2, 1984)

The above styled action against Steve Hill and Marvin Owen was filed on September 15, 1982. The action against the City of Hot Springs, Arkansas was filed March 29, 1984. By order of the Court from the bench on April 26, 1984, the two cases were consolidated and trial on the merits to the Court commenced on that date.

This Court has jurisdiction of the case under 28 U.S.C. § 1343.

The complaints state causes of action against the defendants under 42 U.S.C. § 1983 and § 1985. Specifically the plaintiff alleges that the defendants violated his right to be secure in his person as guaranteed by the Constitution of the United States and the defendants engaged in a conspiracy to do so.

The findings of fact and conclusions of law following herein are incorporated pursuant to Rule 52 of the Federal Rules of Civil Procedure.

On July 22, 1982, the plaintiff and his girl friend, Loretta Hecker, now Mrs. Loretta Hiegel, came to the city of Hot Springs, Arkansas. They traveled by car from Florida on a leisurely trip to Hot Springs for a visit with some friends of Mr. Hiegel. After a brief visit they were to go on to Conway, Arkansas for a family reunion. On arriving at Shreveport, Louisiana, they decided to stop over for a brief time to attend the races at Louisiana Downs. They arrived at the race track after the noon hour and watched two or three races. In the meantime, they enjoyed some drinks at the race track before leaving for Hot Springs. They left the race track about 2:30 p.m. or a little after. On the trip to Hot Springs they stopped for a beer and arrived in Hot Springs late afternoon.

They located the residence of Mr. Hiegel's friend where they would stay over night with him and his wife. After a few drinks they had dinner. After dinner the four of them decided to go out to some of the Hot Springs clubs. At each of the clubs they visited, the Hiegels had at least one drink each. At some point that night, Mr. Hiegel and Ms. Hecker dropped off the other couple at their house and then the Hiegels went back out to visit a few more clubs. It has not been disputed that the pair was arrested on or about 12:41 a.m., July 23, 1982. Mr. Hiegel was arrested for driving while intoxicated and Ms. Hecker was arrested for public intoxication. The arresting officer was Officer Steve Hill of the Hot Springs, Arkansas police department. Mr. Hiegel and Ms. Hecker were transported without incident to the Garland County

Sheriff's Department for the purpose of giving the plaintiff a breathalizer test. Mr. Hiegel registered .15 on the breathalizer machine indicating intoxication.

At this point the testimony of the parties becomes conflicting. Ms. Hiegel testified she was left in the officer's car while Mr. Hiegel was taken inside the Sheriff's department and she did not see the complained of incident. Mr. Hiegel's memory is spotty. He remembers going inside the Sheriff's department, waiting in a room with some other persons and taking the breathalizer test. He remembers also leaving the Sheriff's department, seeing the steps in front of the Sheriff's department but then his memory stops.

Officer Hill testified that he took both Mr. Hiegel and Ms. Hecker inside the Sheriff's department. Mr. Hiegel and Ms. Hecker were both quite drunk. Mr. Hiegel had been somewhat boisterous earlier but calmed down and was no problem to handle at that time. After the test had been given to Mr. Hiegel, Officer Hill escorted them back to the police car for transportation to the city jail. Officer Hill helped Ms. Hecker into the left side rear door of the car and turned around to get Mr. Hiegel into the car. Mr. Hiegel was standing behind Officer Hill and when Officer Hill turned around, Mr. Hiegel struck Mr. Hill in the face with his fist. Officer Hill was knocked backwards. At this point, Officer Hill reached for his flashlight in his back right pants pocket and struck out at Mr. Hiegel. The flashlight struck Mr. Hiegel on the left side of Mr. Hiegel's head and he fell to the ground. Officer Hill made only the single blow. Mr. Hiegel sustained a serious injury from the blow that required surgery.

There was additional evidence introduced at the trial that Mr. Hiegel had been afflicted with a manic depressive mental state since the late 1960's. He has been hospitalized over ten times for this condition. Also he was taking 900 milligrams of lithium a day for this condition at the time of the incident. Lithium taken with alcohol intensifies the effect of alcohol. Also the plaintiff testified that at several points in his life he has had periods where he could not remember where he was or what he was doing.

Officer Hill testified that when he was struck by Mr. Hiegel, he was knocked backwards. This event occurred in the "v" formed by the left opened rear door of the car and the car itself. There was no retreat. Ms. Hecker was seated to the officer's rear and the aggressor Mr. Hiegel was to his front at the opening of the "v". Officer Hill wore his pistol on his right side. He testified that he was aware of his gun and Ms. Hecker's ability to reach his gun from where she was seated. The area the car was parked in was unlit and Officer Hill could not see distinctly. He did not have time to think but felt he was in a dangerous position and instinctively struck out with his flashlight. When he struck out he was not aiming at any particular spot. Officer Hill further testified he did not intend to cause serious physical injury to the plaintiff.

In light of the testimony presented at the trial of the case, the Court's opportunity to observe such testimony and the record as a whole, the Court credits the testimony of Officer Hill.

The plaintiff contends that Officer Hill unjustifiedly used deadly force against him and thereby deprived him

of constitutional rights in violation of 42 U.S.C. §1983. The plaintiff also contends that Marvin Owen as police chief and the City of Hot Springs established a policy or custom that allowed the use of such unlawful deadly force which itself is unconstitutional under §1983. The plaintiff contends such policy or custom was pursued by the defendants in violation of 42 U.S.C. §1985, conspiracy to interfere with civil rights.

The defendants contend that under the circumstances of the case that deadly force as defined in the statute was not used. Alternatively, if the Court should decide that the officer used deadly force, the officer was justified under the facts and circumstances of the case to use such force. Further, the charges against police chief Marvin Owen and the city of Hot Springs have not been substantiated by a preponderance of the evidence in the record.

The Court is guided in it's (sic) determination of this case by the Arkansas statutes concerning justification, Ark. Stat.Ann. §41-501 et seq., §41-501(5) defines "deadly physical force" as "physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury". §41-510 states that "a law enforcement officer is justified in using deadly physical force upon another person when he reasonably believes it is necessary: (a) to effect an arrest or to prevent an escape from custody of an arrested person whom he reasonably believes has committed or attempted to commit a felony; or (b) to defend himself or a third person from what he reasonably believes to be the use of or imminent use of deadly physical force.

Justification is a defense. After the plaintiff has shown a prima facie case, the defendant has the burden of

going forward and the burden of proof respecting justification. *Robertson v. Sisk,* 115 Ark. 461, 171 S.W. 880 (1914); *Russ v. Ratliff,* 538 F.2d 799 (8th Cir. 1976); *Texas v. Burdine,* 450 U.S. 248 (1981).

There are two different ways to construe the definition of "deadly force" under the statute. The plaintiff urges the Court to view the use of the flashlight in a retrospective fashion. Thus since the flashlight was used in a fashion which caused serious physical injury, it should be construed as the use of deadly force. The defendant urges the Court to view the use of the flashlight from the subjective perspective of Officer Hill before the contact occurred. Officer Hill struck out with the flashlight without an intent to do serious physical injury. The use of a flashlight is not necessarily the use of deadly force in all instances (example: a blow to the ribs). Therefore, the defendants contend deadly force was not used.

Section 41-510 provides for the use of deadly force from the subjective perspective of the officer. An officer is justified in using such force if *he* reasonably believes it necessary to effect the purposes of his responsibility pursuant to the statute. This Court is of the opinion that whether there was deadly force used should be viewed from the same perspective.

From the testimony presented at the trial, the Court is of the opinion Officer Hill did not intend to cause serious physical injury when he struck out at Mr. Hiegel. Officer Hill only intended to bring Mr. Hiegel under control. Because Officer Hill did not intend to cause serious physical injury, deadly force as defined under the statute was not used. It is regretable that Mr. Hiegel was struck on

the head and sustained serious injury, but because he was so injured does not in itself indicate that deadly force was used intentionally. Because Officer Hill did not view beforehand his use of the flashlight as the use of deadly force, this Court is of the opinion that deadly force was not applied.

It was notworthy to this Court that the expert presented by the plaintiff in the case had a similar experience. Dr. Kirkham had served for a period of time as a police officer in Florida. From that experience he wrote a book, *Signal Zero,* in which he recounts a time when he hit a man attacking his partner with a flashlight in the head. Dr. Kirkham was aiming for the man's shoulder, but the man turned and was hit in the head. The flashlight fell apart and the man fell to the ground. Dr. Kirkham testified to the Court that he felt the necessity to strike the man with the flashlight at the time.

The Court is of the opinion that Officer Hill used such physical force as he reasonably believed was necessary to defend himself under the circumstances. Such force is justified under Ark. Stat. Ann §41-506. Because justifiable force was used, there was no violation of Mr. Hiegel's rights under 42 U.S.C. §1983. The complaint should be dismissed as to Officer Hill.

Also, as established in the record, Marvin Owen and the City of Hot Springs have not been shown by credible testimony to be liable in view of the holding that justifiable force was used. Furthermore, the Court is of the opinion that the plaintiff has failed his burden of showing by credible evidence the necessary involvement of Marvin Owen or the City of Hot Springs under §1983 or §1985 to sus-

tain a cause of action. In *Russ v. Ratliff*, supra, where the Court found unjustifiable force was used by the police officer, the Court held that there must be some evidence that the supervisory officials had acquired specific knowledge of a policeman's propensities for violence to and maltreatment of persons under arrest. In *Wilkerson v. Sarver*, 72 F.R.D. 605 (E.D.Ark. 1976), the Court held that there must be evidence of personal involvement of the defendant or showing of direct responsibility for the actions of the party involved. The Court is of the opinion that there is no such evidence in this case. The plaintiff's complaint should therefore be dismissed as to Marvin Owen and the City of Hot Springs.

A separate judgment will be entered in accordance with this opinion.

Dated: this 19th day of June, 1984.

/s/ Oren L. Harris
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

NOS. 82-6059 and 84-6050

JOSEPH J. HIEGEL,

PLAINTIFF,

VS.

STEVE HILL, MARVIN OWEN, and
THE CITY OF HOT SPRINGS,

DEFENDANTS.

ORDER

(Filed July 30, 1984)

On July 2, 1984, Defendants Steve Hill and Marvin Owen filed a Motion for Costs in the above-styled case pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. On July 5, 1984, Plaintiff filed a response objecting to Defendants Motion.

The Court has reviewed both pleadings submitted by parties in the case, as well as the record as a whole, and is of the opinion that the costs listed in Defendants' Motion are both reasonable and necessary expenses of the litigation. The Court is of the opinion, therefore, costs in the amount of $5,460.35 should be taxed to the Plaintiff by the Clerk.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the Defendants are hereby awarded costs as enumerated in their Motion and the Clerk shall tax the Plaintiff costs in the amount of $5,460.35.

Dated this the 27th day of July, 1984.

/s/ Oren L. Harris
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1814WA
-2045WA

Joseph J. Hiegel,

Appellant,

v.

City of Hot Springs, etc.,

Appellee.

Appeals from the United States District Court for the Western District of Arkansas

JUDGMENT

(Filed September 12, 1985)

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court is affirmed. The district court's award of costs is vacated and the case is remanded for a new determination of costs.

August 19, 1985

A True Copy.

ATTEST: Clerk, U.S. Court of Appeals, Eighth Circuit.
9/9/85